



THE ATTORNEY GENERAL OF TEXAS

GERALD C. MANN

AUSTIN 11, TEXAS

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ATTORNEY GENERAL

Honorable V. J. Campbell
County Attorney, Garza County
Post, Texas

Dear Sir:

Opinion No. 0-5638

Re: Whether a fee for the refunding
of Courthouse and Jail outstand-
ing bonds can be paid from the
Courthouse and Jail Sinking Fund,
under the facts set forth.

Your letter of September 24, 1943, requesting the
opinion of this department on the question stated therein,
reads as follows:

"Are the County Commissioners of a named
County authorized to pay from the Courthouse and
Jail Sinking Fund, a fee in the sum or amount of
\$3,267.00 for refunding the Courthouse and Jail
outstanding bonds, there is outstanding bonds in
the sum of \$66,000 and the fee as stated will be
in the amount of \$49.50 per thousand. The ques-
tion is, shall that fee be diverted from the
Courthouse and Jail Sinking Fund to the fee exacted
for the refunding of these bonds.

"The County Judge and Commissioners under-
stand that the matter is optional, as was declared
by the Supreme Court of Texas in mandamus proceed-
ings instituted by Cochran County, Texas."

The contract between the county commissioners and H.
L. Shaffer and Company, a certified copy of which accompanies
your inquiry, reads as follows:

"HONORABLE CO. Judge and Commissioners'
Court of Garza County, Texas.

"GENTLEMEN:

"Referring to your \$82,000 Court House and
Jail bond issue dated Feb. 15, 1927, of which
there are outstanding \$66,000, bearing 5½% inter-
est, we make you the following proposition for re-

funding of the now outstanding bonds into refunding bonds bearing 3% interest and maturing as follows:

"Same as the now outstanding bonds.

"We agree to use our best efforts in assembling the old bonds for exchange for new refunding bonds on a basis of par for par, and we will pay all the expenses incurred by us in the refunding of the bonds. We will also pay for the attorney's opinion and pay for the printing of the new bonds. For and in consideration of our services and expenses in this connection, it is understood and agreed that you will pay us at the rate of \$49.50 per \$1,000 of bonds exchanged as same are exchanged. In event no bonds are exchanged you will owe us nothing.

"It being further understood that you will cooperate with us to the end that the refunding of these bonds is completed without undue unnecessary delay.

"The County to have the privilege of paying off \$10,000 of the bonds out of sinking fund money.

"Respectfully submitted,

"H. L. Shaffer & Company

"By H. L. Shaffer

"The above proposition is hereby accepted by order of the Commissioners Court, this 1st day of July, 1943."

Article 839, Vernon's Annotated Civil Statutes, provides:

"No city or county treasurer shall honor any draft upon the interest and sinking fund provided for any of the bonds of such city or county, nor pay out nor divert any of the same, except for the purpose of paying the interest on such bonds or redeeming the same, or for investment in such securities as may be provided by law."

Replying to your question, as to the authority of the commissioners' court to pay the fees or commissions called for in the contract out of the Sinking Fund of the Courthouse and Jail Bonds, we call your attention to the case of Elser v.

City of Fort Worth, 27 S.W. 739-741, in which the Court held that the test of the legality of a particular use of the sinking fund is whether or not the fund is being used for the purpose of ultimately accomplishing that result (the final redemption of bonds) and is not being diverted from the main object of its creation. In that case the Court held that the drawing of the draft to buy securities as an investment of the sinking fund was a draft drawn to redeem the bonds, inasmuch as it was a step toward the final redemption of the bonds.

In a recent case by the Kentucky Court of Appeals, The Governor v. Wolfe County, 163 S.W. (2d) 485, the Court holds that the county "could legally contract with some agency to bring together the bondholders and persuade them to exchange their 5% bonds for others bearing a less rate, and running over a longer period, and to pay the agency to prepare and file application for approval of a refunding plan; work out plans, to prepare and deliver all legal papers necessary for the consummation of the plans, the fees for the services to be paid from the Road and Bridge Sinking Fund, and not from the proceeds of sale, since the plan provides for no sale."

In our Opinion No. 0-3320, a copy of which is enclosed herewith, we held that the Board of County and District Road Indebtedness has ample authority to pay a premium for eligible road bonds and to use the sinking fund of counties deposited with the Board to retire such bonds, in payment of such premiums. In Opinion No. 0-5919, a copy of which opinion is enclosed herewith, this department held that the commissioners' court had authority to enter into a contract with a certain company in connection with the proposed plan of refunding courthouse bonds and to pay the fees or commissions called for therein out of the sinking fund of the courthouse bonds.

In the contract submitted by you, it appears that the interest will be reduced from $5\frac{1}{2}\%$ to about 3.45%. This figure (3.45) includes the 3% interest stated in the contract and the fees to be paid for the refunding of the now outstanding bonds. It is a step toward the final redemption of these bonds, if the county can, by paying a certain amount now, save a larger amount in the future interest costs on these bonds. Under the proposed plan of refunding these $5\frac{1}{2}\%$ bonds by the issuance of refunding bonds bearing 3% interest, the county will reduce its obligation. Therefore, it is our opinion that the use of the Sinking Fund for accomplishing this result is not a diversion of the main object for which the fund was created but is wholly consistent therewith. In other words, the use of these funds for this purpose is in keeping with the purpose for which the fund was created, namely, the ultimate re-

demption of the bonds. Your question is, therefore, answered in the affirmative.

Yours very truly

ATTORNEY GENERAL OF TEXAS

By s/Ardell Williams
Ardell Williams
Assistant

AW:EP:wc

Encls.

APPROVED OCT 16, 1943
s/Gerald C. Mann
ATTORNEY GENERAL OF TEXAS

Approved Opinion Committee By s/GPB Chairman